In the view of the law I have taken, the defendants' application must be dismissed with costs.

Application dismissed.

Solicitors: *N. Sharma; Dharmananda & Co.*

LEONG YOONG v. LEE SEM YOONG

[F.C. (Barakbah L.P., Suffian & MacIntyre F.JJ.) June 13, 1968]

[K.L. — Civil Appeal No. X41 of 1967]

Landlord and Tenant — Burden of proof that premises was built after January 31, 1948 — Meaning of 'premises' — Licensee — Termination of licence — Trespass — Damages — Control of Rent Ordinance, 1956, s. 2(1).

Evidence — Burden of proof — Landlord and Tenant — Onus on landlord to prove that premises was built after relevant date — Control of Rent Ordinance, 1956, s. 2(1).

Evidence — Res Judicata — Matter not in issue in earlier proceedings.

Damages — Trespass to land — Special damages — Actual damage — Full compensation — Special damages and mitigation to be specifically pleaded — Foreseeability.

The respondent was the executor and trustee of the estate of his deceased father. In 1957, the respondent's father purchased land on which stood a certain premises. The appellant was in occupation of the premises. On July 1, 1963, the respondent entered into an agreement to sell the land. The appellant's refusal to vacate the premises prevented him from completing the sale. By a notice to quit dated May 15, 1963, the respondent determined the licence of the appellant to occupy the premises. On the expiry of the notice to quit, the respondent brought an action against the appellant in the sessions court for the recovery of vacant possession of the premises. The action was dismissed on a technical ground.

A second notice to quit dated July 24, 1964 was served on the appellant. On the expiry of the notice, the respondent instituted proceedings against the appellant for the recovery of vacant possession of the premises, and for damages for pecuniary loss suffered as a result of the appellant's wrongful occupation of the premises as a trespasser.

The appellant raised two defences — First, he denied that he was a licensee and contended that he was the lawful tenant of the premises. Secondly, he submitted that as the president of the sessions court had said in the judgment in the earlier proceedings that the appellant had occupied the premises since the Japanese Occupation, the issue was *res judicata*, and it was not open for the respondent to prove that the premises were not controlled premises by virtue of their erection after the relevant date.

Both defences were rejected by the trial court (see [1967] 2 M.L.J. 86). The learned trial judge ordered the recovery of vacant possession of the premises. He further awarded $45,800 as special damages for the loss of use of the purchase money and for assessments paid by the respondent until the completion of the sale. In an appeal from this judgment,

Held, dismissing the appeal: (1) bearing in mind that the burden of proving the tenancy was on the appellant, and the fact that the learned trial judge, after having had the advantage of seeing and hearing the witnesses, came to the conclusion that the appellant occupied the premises as a licensee, the finding of fact by the trial court should not be disturbed;

(2) the question of whether the premises existed during the Japanese Occupation was not *res judicata* as it was not in issue in the earlier proceedings before the sessions court;

(3) the order for recovery of vacant possession of the premises was affirmed, but the award of special damages to the respondent was reduced to $26,100, and continuing damages to $900 per mensem.

Per MacIntyre F.J.: ". . . . in an action by a landlord against a tenant in which the tenant claims the protection of the Ordinance, and the question whether the building existed before the relevant date becomes relevant, the onus, in the first instance, would be upon the tenant to show that he is a tenant of a premises as defined in the Ordinance. He would then be entitled to relief unless it is shown that the premises fell within any one of the provisos to the general definition of 'premises'. Therefore, the onus of proof that the premises were not subject to the Ordinance by virtue of proviso (a) to the definition of premises would lie upon the landlord."

Cases referred to:—

(1) *Powell* v. *Streatham Manor Nursing Home* [1935] All E.R. Rep. 58.

(2) *Watt or Thomas* v. *Thomas* [1947] A.C. 484.

(3) *Mohamed bin Myddin* v. *Teo Mek Yok* [1966] 2 M.L.J. 284, F.C.

(4) *Dadhi Ral Yado* v. *Mukat Rai* [1958] M.L.J. 193.

(5) *Annamalai Chettiar* v. *Yeoh Kee Tin* [1957] M.L.J. 9.

(6) *A. V. Vandayar & Ors.* v. *Sivagami Achi & Anor.*, A.I.R. 1949 P.C. 319.

FEDERAL COURT.

V. K. Palasuntharam for the appellant.

L. Kandan and *Kok Wee Kiat* for the respondent.

Cur. Adv. Vult.

MacIntyre F.J.: This is an appeal against the judgment of Gill J. in Kuala Lumpur High Court Civil Suit No. 1189 of 1964 ordering the appellant herein:—

(a) to deliver vacant possession to the respondent of premises No. 15-A Perkins Road on or before April 30, 1967;

(b) to pay damages in the sum of $45,800 for pecuniary loss suffered by the respondent as the result of the appellant's wrongful occupation of the premises as a trespasser;

(c) to pay continuing damages at the rate of $1,100 per mensem from May 1, 1967 until delivery of possession; and

(d) costs of the action.

In this action, the respondent sues as the executor and trustee of the estate of his late father, Lee Lip Sang alias Lee Lit Seng (hereinafter referred to as the deceased). The action is for recovery of possession of the aforesaid premises on the footing that the appellant is a

trespasser by virtue of the determination of his licence to occupy the said premises by a notice to quit dated May 15, 1963 or in the alternative, by a notice to quit dated July 24, 1964.

On the expiry of the aforesaid notice to quit dated May 15, 1963 the respondent had sued the appellant for recovery of vacant possession in Kuala Lumpur Sessions Court Civil Action No. 291 of 1963; but at the conclusion of the trial, the claim was dismissed on a point of law taken by the court itself, namely, it had no jurisdiction to order the defendant to give up possession of the premises to the respondent since the land was at the time of the action registered in the name of a liquidator by virtue of an order of court.

It is not necessary to go into the history of the transactions which resulted in the land being registered in the name of a liquidator but it would suffice to say that when the deceased, in the present action, purchased on the 21st of May 1957 the area on which the premises stand, it formed part of a larger area which had not been sub-divided. The liquidator was therefore unable to effect a transfer of the portion sold until sub-division and issue of a separate title. A separate title was issued on July 15, 1964 by which time the deceased had died. It was only after the transmission of the title to the respondent as executor and trustee of the estate of the deceased, that the second notice to quit dated July 24, 1964 was served.

The appellant in his statement of defence, denies occupying the premises as a licensee and avers that he is and has been the lawful tenant of the premises or in the alternative a statutory tenant paying a rent of $20 per mensem. He further avers that he had been in continuous occupation of the land during and since the Japanese Occupation "first paying ground rent at $5 per month and thereafter with increases." He finally pleads that the suit is *res judicata*.

"Premises" is defined in section 2(1) of the Control of Rent Ordinance, 1956 as follows:—

> "Premises" means any dwelling house, flat, factory, warehouse, office, counting house, shop, school, and any other building in which persons are employed or work and any part of any premises let or sub-let separately and includes any land, outbuilding and appurtenances occupied therewith, but does not include —
>
> (a) New buildings completed after the 31st day of January, 1948.

"Tenancy" is defined in the same section as meaning "any lease, demise, letting or holding of premises, whether in writing or otherwise, by virtue whereof the relationship of landlord and tenant is created, howsoever, such relationship may be described . . . ."; and 'tenant' is defined as meaning the "tenants of premises in respect of which a tenancy exists . . .".

From the above definitions, it would appear that the essential requisites of a rent controlled premises are: (a) that it should have been let or sub-let whereby the relationship of landlord and tenant is created and (b) it should have been built and completed before the 31st of January, 1948 (hereinafter referred to as the relevant date).

At the trial the appellant testified that he built the premises during the Japanese Occupation and paid land rent of $5 per mensem with subsequent increases. Thereafter, he had paid rent at the rate of $10 and later $15 per mensem to one Yap Tai Nyen, the attorney of the estate of Eu Tong Sen deceased; and after his death to his widow; and after the purchase of the land by the deceased, to him at the rate of $20 per mensem and after his death to the respondent. He was, however, unable to produce a single rent receipt because, according to him, his successive landlords refused to give receipts.

On April 30, 1963 the respondent offered to pay compensation of $3,000 to the appellant to vacate and deliver possession of the premises in question. By a letter dated 1st May, the appellant rejected the offer and forwarded the sum of $100 being alleged arrears of rent from 31st December 1962. It was in reply to this letter that the aforesaid notice to quit dated 15th May was given to the appellant, returning the money and demanding vacant possession of the premises on the ground that he was a squatter and not a tenant.

To corroborate his evidence that he was a tenant, the appellant relied on two witnesses. The first was Leong Hong Yuen (D.W.2) who testified that sometime in 1963, he had, in the presence of the respondent interpreted to the appellant the contents of a document in English in which the respondent had offered to pay compensation of $3,000 and in the event of the appellant accepting the offer he would be permitted to stay in the premises without paying any rent for three or four months. He further testified that the appellant had rejected the offer, whereupon the respondent snatched away the document. The implication of this evidence is that the respondent snatched away the document because it contained an offer regarding rent from which it could be construed that the appellant was a tenant. The respondent could not recall whether there was any mention of rent in the document. He denied snatching the document away or doing so in the presence of any witness.

The other witness called was Manickam (D.W.4), who testified that he was living in the same premises with the appellant since 1950 paying a rent of $5 per mensem. He recalled paying rent for the premises on behalf of the appellant in 1950 to one Yap Tai Nyen, the attorney of the estate of Eu Tong Sen, at his office but was not given any receipts.

That in short was the direct evidence adduced by the appellant to prove the tenancy.

However, counsel for the appellant asked this court to take into consideration, "having regard to common course of human conduct and private business", certain inferences from the evidence. He said that it was unlikely that the appellant would have been allowed to run a profitable business on the premises without paying rent. He further pointed out that on the 2nd of November 1961 the appellant had presented bills for $685.25 for the repair of the deceased's motor car and for brokerage fee amounting to $3,600 for arranging the sale to the deceased of the land on which the premises stood; and that the amounts which were overdue for about 3 years were paid and settled on the 22nd of November, 1961. Then on the next day the appellant had given an interest free loan of $4,000 to the respondent. These transactions, according to counsel, cannot be regarded as a one-way traffic and it would be reasonable to presume that the respondent enjoyed reciprocal benefits by collecting rent from the appellant. If the appellant was in fact paying rent, the question may be asked why then did he wait for three years to collect his dues when he could have set off the rent against the amounts due? To say that he preferred to keep his accounts separate is not a very satisfactory answer especially when the period during which he was deprived of the use of the money was more than three years. Besides, the payments made by the respondent to the appellant may not have been a one-way traffic in generosity when it is realised that in return for the payment of his dues amounting to $4,285.25 out of the estate funds, the respondent was given in his personal capacity an interest free loan of $4,000 on the very next day.

On November 12, 1963, Messrs. Shearn Delamore & Co. wrote to the liquidator enquiring whether he had any record of a lease granted to the appellant in respect of 15A, Perkins Road, Kuala Lumpur. The liquidator replied that there was no record of any rent paid by the occupier. When land occupied by a squatter or squatters is sold, the vendor usually inserts a clause in the agreement of sale relieving himself of the obligation to give vacant possession. When the liquidator sold the land to the deceased he had the following provisions included in clause 5 thereof, which read:—

"The said hereditaments are sold subject to all existing tenancies (if any) and to the occupation rights of the occupiers thereof and the purchaser shall not require the vendor to furnish any particulars in respect thereof."

Again, no purchaser would agree to purchase a land on those terms unless he was aware that the occupiers were squatters and that either he could induce them to vacate the land on payment of compensation, or could afford to wait until they are evicted by due process of law.

The appellant must have known that the estate was in the hands of a liquidator, since it was he who negotiated the sale of the land to the deceased. Why then did he not pay the rent to the liquidator who would have been obliged to issue him a receipt? His conduct in this respect belies his assertion that he was paying rent.

There is nothing on the record to indicate that the trial judge had not considered every aspect of the evidence. The appellant had no rent receipts to back up his story. Leong Hong Yuan's evidence was full of drama but devoid of substance. Even, if, what he said was true, the mere offer to allow the appellant to stay in the premises free of rent in the event of his acceptance of compensation is not necessarily an admission that he was a tenant. Besides, in my opinion, the whole of the evidence is inadmissible. It is secondary evidence of the alleged contents of a document. Its admission was objected to on the ground that a notice to produce the document was not served as required by section 65 of the Evidence Ordinance, which is a prerequisite for the introduction of secondary evidence. However, the learned trial judge, after hearing the witness rejected his evidence as unworthy of credit. As for the evidence of Manickam, he was not a disinterested witness since any order on the appellant to vacate the premises would have adversely affected his interest. The surrounding circumstances of the case are such that they could support or discredit either version. Bearing in mind that the burden of proving the tenancy is upon the appellant, and the fact that the learned trial judge had the advantage of seeing and hearing the witness, it would be asking too much of this court to hold that the decision was plainly wrong. It is well settled law that an appeal court will not disturb a finding of fact by a trial judge unless it is manifestly wrong. In *Powell* v. *Streatham Manor Nursing House,*[1] Lord Sankey L.J. said:—

"In an appeal against a judgment of a judge sitting alone, the court will not set aside such judgment unless the appellant satisfies that the judge was wrong and his decision should have been the other way."

The same view was taken by the House of Lords in *Watt or Thomas* v. *Thomas.*[2]

It would appear from the grounds of judgment, that the learned judge, who was no doubt guided by the decision of this court in *Mohamed bin Myddin* v. *Teo Mek Yok,*[3] held that "the onus was upon the defendant to prove that he was in fact a tenant of the premises and that the premises were subject to the Control of Rent Ordinance, 1956", hereinafter referred to as the 'Ordinance'. Although this point is not strictly relevant to the determination of this appeal, since in my opinion, once it is decided that the premises were not let, the question of whether the premises were built after the relevant date, is wholly irrelevant, there appears to be some

confusion regarding the question of on whom lies the onus of proving that a building was completed after the relevant date, which should be cleared up. In *Mohamed bin Myddin* v. *Teo Mek Yok* [3] this court decided that the onus of proving that a house was built before the relevant date in order to bring it within the protection of the Ordinance was upon the tenant. A contrary view was expressed by the Singapore High Court in *Dadhi Ral Yado* v. *Mukat Rai.* [4] The judgment of this court was based on the decision of the Malayan Court of Appeal in *Annamalai Chettiar* v. *Yeoh Kee Tin.* [5] In that case the question was on whom lay the onus of proof that rent was in arrears at a lawful rate in an action brought by a landlord by virtue of the provisions of section 12 of the Control of Rent Ordinance, 1948, which read:—

"No landlord shall without the permission of the board in writing, eject or apply to any court for an order for the ejectment of his tenant from any premises:

Provided that this section shall not apply to ejectment for non-payment of rent where rent at a lawful rate has been in arrears for fourteen days."

Buhagiar J., with whose decision Mathew C.J. and Good J. concurred, held that:—

"There was nothing in the section affecting the general principles of evidence regarding the burden of proof as laid down particularly in section 103 of the Evidence Ordinance, 1950; under that section the burden of proof as to any particular fact lies on that person who wishes the court to believe in its existence, unless it is provided by any law that the proof of that fact is to lie on any particular person. In this case the tenant alleged that the rent of $130 a month was in excess of the standard rent; the burden of proof was therefore upon him and there is nothing in section 12 of the Control of Rent Ordinance, 1948 to shift the burden on the landlord."

With respect, it must be pointed out that there is something in section 12 which throws the burden of proof on the landlord. The landlord is prohibited from suing for ejectment without the permission of the board in writing, unless (the proviso provides) he can satisfy the court that not only the rent was in arrears for fourteen days but that it was in arrears at a lawful rate. I should have thought that the onus was upon the landlord to satisfy the court that his case fell within the four walls of the proviso to that section.

We are indebted to Mr. Palasuntharam for drawing our attention to the judgment of the Privy Council in *A. V. Vandayar & Ors.* v. *Sivagami Achi & Anor.* [6] The question involved in that appeal was whether the appellants were entitled to relief as agriculturists within the meaning of section 3(2) of the Madras Agriculturalists' Relief Act, 1933, which was passed with the object of giving relief to agriculturists as defined in general terms by that section. However, two of the relevant provisos to the section exclude certain classes of agriculturists from the operation of the section. In an action to collect mortgage dues against certain agriculturists, the Madras High Court held that the onus of proof lay on the agriculturists to show that they did not fall under any of the relevant provisos to section 3(2). The Privy Council thought otherwise. The relevant part of their Lordships' opinion reads:—

"The High Court seemed to have considered that the burden of proving that they were agriculturists entitled to relief under the Act lay upon the appellants. In the first instance no doubt the burden was upon the appellants to show that they were agriculturists. But having shown that they fell under the general definition of that word they would be entitled to relief unless they were deprived of that privilege by one of the provisos and the burden will lie upon any one asserting to prove the case. Section 102, Evidence Act and illustration (b). This is the point to be borne in mind though it is not of paramount importance since the whole of the evidence is on record."

Section 102 of our Evidence Ordinance (which is the same as the corresponding section in the Indian Evidence Act) gives the ultimate test on whom lies the burden of proof. The section reads:—

"The burden of proof in a suit or proceeding lies on that person who would fail if no evidence at all were given on either side".

And illustration (b) reads:—

"A sues for money due on a bond. The execution of the bond is admitted, but *B* says that it was obtained by fraud, which *A* denies. If no evidence is given on either side, *A* would succeed as the bond is not disputed and the fraud is not proved. Therefore the burden of proof is on *B*."

Now to advert to the definition of premises in section 2(1) of the Control of Rent Ordinance, 1956. The definition embraces all types of buildings let or sub-let whereby the relation of landlord and tenant is created, but proviso (a) exempts from the operation of the Ordinance all buildings completed after the relevant date. Applying the principle enunciated by the Privy Council, it must follow that in an action by a landlord against a tenant in which the tenant claims the protection of the Ordinance and the question of whether the building existed before the relevant date becomes relevant, the onus, in the first instance, would be upon the tenant to show that he is a tenant of a premises as defined in the Ordinance. He would then be entitled to relief unless it is shown that the premises fell within any one of the provisos to the general definition of 'premises'. Therefore, the onus of proof that the premises were not subject to the Ordinance by virtue of proviso (a) to the definition of premises would lie upon the landlord.

The learned trial judge has held that the plea of *res judicata* by virtue of the judgment in the aforesaid Sessions Court Civil Action No. 291 of 1963 must fail because the action was not dismissed on its merits but upon a technical ground. It is clear, however, from the record of appeal and the submission of counsel that

what was claimed to be *res judicata* was only the issue whether the premises in question were built before or after the relevant date. It was submitted, that since the president of the sessions court had said in his judgment that the defendant (appellant in this appeal) "has been occupying a motor workshop situated on the land since the Japanese Occupation" it was not open to the plaintiff (respondent) to prove in the present suit that the premises were not controlled premises by virtue of their erection after the relevant date.

At the hearing of the present suit counsel for the appellant sought to tender the statement of defence in the sessions court action in evidence since the statement of claim had been admitted. The application was objected to and the court sustained the objection. With respect to the learned judge, the statement of defence should have been admitted, since the issue of *res judicata* was before him. Therefore, by virtue of the powers conferred upon this court by section 45 of the Courts of Judicature Act, 1964, we sent for the record of the proceedings before the sessions court and perused the statement of defence. There is nothing in the statement of defence to suggest the question of whether the premises existed during the Japanese Occupation was put in issue. If the learned president had said in the introductory part of his judgment that defendant had lived on the premises since the Japanese Occupation, he was merely repeating what the defendant had said in his evidence. However, even if the president had held that the defendant had lived on the premises since the Japanese Occupation, it could mean, according to the definition of the word 'since' in the *Shorter Oxford Dictionary*, that he lived there, ever since the Japanese Occupation or any time after the Japanese Occupation and the date of the judgment.

However, as mentioned hereinbefore, the issue became wholly irrelevant when the trial judge found as a fact that the appellant was not a tenant of the premises but a gratuitous licensee. It is an elementary proposition of law that a gratuitous licence is revocable at will but that reasonable time should be given to the licensee to remove from the premises. The first notice was given on the 15th of May 1963 to vacate and hand over possession by the 30th of June. The second notice was given on the 24th of July 1964 to vacate and hand over possession on the 31st August. The present action was filed in November 1964. In his statement of defence dated 20th December 1964, the appellant did not think it necessary to plead in the alternative that he was not given reasonable time to vacate. Therefore the question of reasonable time does not arise in this action.

The respondent claimed general as well as special damages. The court made no award in respect of general damages but awarded by way of special damages a sum of $45,850 and continuing damages at the rate of $1,100 per month from the 1st of May 1967 — the date on which vacant possession was to be given under the judgment — until delivery of vacant possession.

The claim for special damages is based on the loss of the use of the purchase money in respect of the land on which the premises stand, from the 1st of September 1964. The facts are as follows: Under an agreement dated 1st July, 1963 the respondent agreed to sell the land to one Loh Boon Siew (P.W.1) at and for a price of $240,000. On the execution of the agreement a sum of $60,000 was paid to account of the purchase price but in regard to the balance of $180,000, it was agreed, *inter alia*, that the sum was to be paid at the expiration of two months notice given by the respondent to the purchaser to the effect that a separate title to the portion of land sold had been issued and that he was in a position to execute a transfer with vacant possession. On 15th July 1964, a separate title was issued and on the 24th, the second notice to quit was given to the appellant requesting him to vacate on or before the 31st of August. On 4th August, the purchaser was said to have agreed to pay a further sum of $40,000 towards the purchase price. However, the appellant failed to vacate and ever since the 1st of September, 1964, the respondent was ready to execute the transfer but unable to give vacant possession.

Another condition of the agreement of sale was that the assessment rates in respect of the land for the second half of the year 1963 were to be paid by the purchaser but thereafter the yearly assessment was to be paid by both parties in equal shares, until completion of the sale. The respondent's share of the assessment for the years 1964, 1965, 1966 and 1967 were $1,585, $3,750, $4,000 and $4,000 respectively. They amounted in the aggregate to $13,335 but for some reason which is not clear from the record, the learned trial judge assessed the amount at $11,750. Thus, special damages in the sum of $45,850 was assessed as follows:—

(i) Interest at 6% on $220,000 for 31 months, *i.e.* from 1st September 1964 to date of judgment	$34,100.00
(ii) Assessment	11,750.00
Total =	$45,850.00

"In an action for trespass to land the plaintiff is entitled on proof of trespass to recover damages even when he has not suffered any actual loss, and when actual damage has been caused he is entitled to full compensation" (see *Halsbury*, vol. 11, (3rd Ed.) para. 441, page 266).

The damages suffered by the respondent in this case are by no means remote. The respondent said in his oral evidence that he had told the appellant that he wanted to sell the land. There

has been no denial of that allegation. If there were grounds for mitigation it was for the appellant to have alleged and proved them:—

"The question of what is reasonable for a plaintiff to do in mitigation of his damages is not a question of law, but one of fact in the circumstances of each case, the burden of proof being upon the defendant" (see *Halsbury*, vol. 11, (3rd Ed.) para. 476, page 290).

In the present action the appellant has not pleaded or proved any fact in mitigation of damages. However, the inclusion of $11,750 in the total of the special damages is untenable since the fact was not pleaded in the statement of claim:—

"In contrast to general damages special damages must be claimed specifically and proved strictly" (see *Halsbury*, vol. 11, (3rd Ed.) para. 386, page 218).

Again:—

"In cases of tort, special damages are recoverable provided they are naturally and directly attributable to a wrongful act and are not too remote. They must however, be pleaded and proved" (see *Halsbury*, vol. II, (3rd Ed.) para. 494, page 304).

I also think that the learned trial judge should not have taken into consideration, in assessing special damages, the sum of $40,000 which the purchaser is alleged to have subsequently offered to pay in addition to the purchase price. It was, if ever made, a gratuitous offer and the contract in the circumstances would be unenforceable by virtue of the provisions of section 26 of the Contracts Ordinance, 1950. Besides, the terms of alleged oral contract amounts to a variation of a written agreement, and the evidence is inadmissible as between the parties by virtue of the provisions of section 92 of the Evidence Ordinance, 1950. In the circumstances, it is doubtful whether this item of damages was foreseeable. The purchaser, or in the unfortunate event of his death, the legal representative of his estate, can repudiate the oral offer to pay the extra $40,000, if made, with complete legal immunity. Again, in my opinion, the period during which the respondent was deprived of the use of the money should have been 29 and not 31 months, since the balance of the purchase price would have become payable only after the expiration of a two months' notice from the 1st of September, 1964, demanding payment if the applicant had complied with the notice to quit on 31st August. Therefore, the measure of special damages would be the loss of the use of $180,000 from the 1st of December 1964 to date of judgment. At 6% per annum, the loss would be $26,100 and the continuing damages would be $900 per mensem.

The appeal is dismissed with costs but the award in respect of special damages, is amended by substituting $26,100 for $45,850 and substituting $900 for $1,100 as continuing damages.

Barakbah L.P. and **Suffian F.J.** concurred.

Appeal dismissed.

REDDY v. EMPLOYEES PROVIDENT FUND BOARD

[F.C. (Barakbah L.P., Suffian & MacIntyre F.JJ.) June 13, 1968]

[K.L. — Federal Court Civil Appeal No. X44 of 1967]

Provident Fund — Withdrawal of fund — Employee leaving West Malaysia for East Malaysia — Whether leaving "Malaya" — Employees Provident Fund Ordinance, 1951, s. 13(1)(d).

Interpretation — "Malaya" in s. 13(1)(d), Employees Provident Fund Ordinance, 1951 — Interpretation and and General Clauses Ordinance, 1948, s. 2 — Malaysia Act, 1963, s. 73(1).

The appellant, a magistrate in West Malaysia, was a member of the Employees Provident Fund. He resigned from his employment, intending to work as a magistrate in East Malaysia, with no intention of returning to West Malaysia. He applied to withdraw the money standing to his credit from the fund under section 13(1)(d) of the Employees Provident Fund Ordinance, 1951, on the ground that he was "about to leave Malaya with no intention of returning thereto". The respondent, the Employees Provident Fund Board refused him authority to withdraw. The appellant applied to the High Court for a declaration that he was entitled to withdraw the money standing to his credit in the fund. The application was dismissed ([1967] 2 M.L.J. 82). In an appeal from this decision, the question before the Federal Court was whether, at the relevant date — September 30, 1965, the word "Malaya" in section 13(1)(d) of the Employees Provident Fund Ordinance, 1951, included East Malaysia.

Held, allowing the appeal: the word "Malaya" in section 13(1)(d) of the Employees Provident Fund Ordinance, 1951, did not include East Malaysia at the relevant date, for the following reasons:—

(i) section 2 of the Interpretation and General Clauses Ordinance, 1948 defined "Malaya" as "the States of the Federation and Singapore"; (ii) under section 73(1) of the Malaysia Act, 1963 (as amended by Act No. 31 of 1965) any reference in any law existing before Malaysia Day, to the Federation shall be construed as reference to Malaysia, "unless the context otherwise requires, or it is otherwise provided by any written law"; (iii) the context in which the word "Malaya" was used in section 13(1)(d) of the Employees Provident Fund Ordinance, 1951 required the court not to construe "the States of the Federation" in the Interpretation and General Clauses Ordinance, 1948 to mean Malaysia for the purposes of the Employees Provident Fund Ordinance. At the relevant date, September 30, 1965, the Ordinance did not apply to East Malaysia, and "leaving Malaya" therefore could only mean leaving the States of West Malaysia and Singapore.

Per Suffian F.J.: "the Interpretation and General Clauses Ordinance . . . still defines the States of the Federation as meaning only what is now West Malaysia . . . in my view effect must continue to be given to the definition in the Interpretation and General Clauses Ordinance. To hold otherwise would be to treat the amendment (No. 31 of 1965) as surplusage."

Per MacIntyre F.J.: " . . . even if the amendment of section 73(1) of the Malaysia Act, 1963, had not been effected by the addition of the words 'unless the context otherwise requires or it is otherwise expressly provided by any written law', I would have still allowed this appeal."

FEDERAL COURT.

Dato' Athi Nahappan (*D. P. Vijendran* with him) for the appellant.